

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

9	SANDRA MCKINNON and KRISTEN)	Case No. CV 12-cv-04457-SC
10	TOOL, individually and on behalf)	
	of others similarly situated,)	ORDER DENYING WITHOUT PREJUDICE
11	Plaintiffs,)	PLAINTIFFS' MOTION FOR CLASS
)	<u>CERTIFICATION</u>
12	v.)	
)	
13	DOLLAR THRIFTY AUTOMOTIVE GROUP,)	
	INC. d/b/a DOLLAR RENT A CAR;)	
14	DOLLAR RENT A CAR, INC.; DTG)	
	OPERATIONS, INC. d/b/a DOLLAR)	
15	RENTA A CAR; et al.,)	
)	
16	Defendants.)	
)	

Plaintiffs Sandra McKinnon and Kristin Tool (collectively "Plaintiffs") bring this putative class action against Dollar Thrifty Automotive Group, Inc., d/b/a Dollar Rent A Car, Dollar Rent A Car, Inc., and DTG Operations, Inc., d/b/a Dollar Rent A Car, which are now wholly-owned by Hertz Global Holdings, Inc. (collectively "Dollar" or "Defendants"). Plaintiffs, customers of Defendants, allege in their third amended complaint that Defendants defrauded Plaintiffs and other customers in California and Oklahoma. ECF No. 79 ("TAC"). Plaintiffs now move to certify two plaintiff classes, a "California Class" and an "Oklahoma Class."

1 ECF No. 92 ("Mot.") at 1. The motion is fully briefed.¹ Pursuant
2 to Civil Local Rule 7-1(b), the Court finds this matter appropriate
3 for disposition without oral argument. For the reasons set forth
4 below, Plaintiffs' motion is DENIED. Defendants' motion to exclude
5 the expert testimony of Donald Lichtenstein in support of
6 Plaintiffs' motion for certification (ECF No. 105) is also DENIED
7 as moot.

8
9 **I. BACKGROUND**

10 **A. Facts**

11 Dollar is one of the nation's largest car rental companies.
12 In addition to providing car rentals, Dollar offers customers
13 different types of liability coverage and damage waivers. This
14 case focuses on the sale of three of those products in California
15 and Oklahoma: Loss Damage Waiver ("LDW"), Supplemental Liability
16 Insurance ("SLI"), and roadside assistance service ("RoadSafe")
17 (collectively "Add-On Products").

18 LDW is an agreement with the customer that relieves the
19 customer of financial responsibility for unintentional damage to
20 the rental car. In California, the sale of LDW is regulated by
21 Section 1936 of the California Civil Code. Oklahoma does not have
22 laws or regulations that specifically address LDW.

23 SLI is a liability insurance product that provides coverage
24 against claims by third parties arising from accidents involving
25 the rental car. In California, SLI is subject to California
26 insurance law. See Cal. Ins. Code § 1758.86.

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¹ ECF Nos. 110 ("Opp'n"); 120 ("Reply"); 126 ("Sur-Reply").

1 RoadSafe provides assistance in the event of problems that may
2 arise with the rental car that are caused by the customer, such as
3 draining the battery, locking a key in the car, or running out of
4 gas.

5 Many customers' personal automobile insurance and/or credit
6 cards already provide protections similar to Dollar's LDW offering,
7 subject to various limits and deductibles. In part for that
8 reason, California requires that car rental companies provide
9 customers with oral and written disclosures concerning the
10 potential overlap.² The disclosures must be made "in the rental
11 contract or holder in which the contract is placed and, also, in
12 signs posted at the place, such as the counter, where the renter
13 signs the rental contract." Cal. Civ. Code 1936(g). In addition,
14 the rental car company must provide oral disclosures, and the
15 customer's receipt of those disclosures must be demonstrated by
16 initialing a document. Id. Finally, "[a] rental company that
17 disseminates . . . an advertisement containing a rental rate [is
18 required to] include in that advertisement a clearly readable
19 statement of the charge for a damage waiver and a statement that a
20 damage waiver is optional." Id. at (h)(i).

21 ² The disclosure must include the following:

22 (A) the nature of the renter's liability . . . (B) the
23 extent of the renter's liability . . . (C) the renter's
24 personal insurance policy or the credit card used to pay
25 for the car rental transaction may provide coverage for
26 all or a portion of the renter's potential liability, (D)
27 the renter should consult with his or her insurer to
28 determine the scope of insurance coverage, including the
amount of the deductible, if any, for which the renter is
obligated, (E) the renter may purchase an optional damage
waiver to cover all liability, subject to whatever
exceptions the rental company expressly lists that are
permitted under subdivision (f), and (F) the range of
charges for the damage waiver.

Cal. Civ. Code § 1936(g).

Dollar trains its agents in California to disclose orally that LDW is optional and may overlap with other sources of coverage. ECF Nos. 107-2 ("Capsanes Decl.") ¶¶ 21, 31; 107-4 ("Hayes Decl.") ¶ 7; 107-3 ("Lainez Decl.") ¶ 14; 107-5 ("Raman Decl.") ¶ 8.

Dollar's agents, however, cannot advise customers on the specific terms of any third-party product that might be duplicative of the coverage provided by Dollar's LDW or other Add-On Products.

Capsanes Decl. ¶ 21; Hayes Decl. ¶ 8; Lainez Decl. ¶ 10; Raman Decl. ¶ 9. Customers at Dollar's California locations also have to confirm their product elections and that they have been provided oral disclosures on a console known as a "SigCap."

After confirming product elections, the customer signs the SigCap console and then receives a print-out of the rental agreement, which states the estimated cost of the rental, including line-items for all optional products, and a "rental jacket" containing further terms and conditions. Lainez Decl. ¶ 20; Raman Decl. ¶ 13; Hayes Decl. ¶ 13; Perring Decl. ¶ 11. Dollar's California locations also include written disclosures on the rental agreement and rental jacket as required by Civil Code Section 1936.

ECF No. 110-14 ("Selco Decl.") ¶ 9. In addition to those disclosures, Dollar's California locations provide the same disclosures on signs, placemats, brochures, and pamphlets. Capsanes Decl. ¶ 34; Lainez Decl. ¶¶ 22-23; Raman Decl. ¶¶ 11-13; Hayes Decl. ¶¶ 14-15; ECF No. 126-7 ("Lainez Dep.") at 61:23-65:19; ECF No. 126-5 ("Hayes Dep.") at 46:12-47:6; ECF No. 126-1; ECF No. 126-2; ECF-No. 126-3; ECF No. 126-4. Plaintiffs, however, have presented evidence showing that such disclosures may sometimes be absent at certain locations. See ECF Nos. 120-14; 120-15.

Dollar's customers make reservations with Dollar through multiple channels, including through Dollar's website, third-party travel services (such as Priceline or Expedia), over the telephone, or by walking into a Dollar location. Regardless of how they make reservations, customers are first presented with the opportunity to purchase Add-On Products when they go to pick up their car rental at the Dollar rental counter. The conversations between customers and agents at the Dollar rental counter vary depending on the customer's questions, the types of products customers are interested in purchasing, and other factors. Perring Decl. ¶ 8; Capsanes Decl. ¶ 26; Hayes Decl. ¶¶ 4, 9; Lainez Decl. ¶¶ 4, 6-7; Raman Decl. ¶¶ 5-6.

Sales of Add-On Products are a significant part of Dollar's revenue. ECF No. 94-10, Ex. 14. Dollar agents are trained to sell Add-On Products to as many customers as possible using a variety of persuasive techniques, and they are paid commissions, in part, based on such sales. See ECF No. 94-8, Ex. 5; ECF No. 94-9, Ex. 8. For example, agents are instructed on how to overcome customer objections such as "I'm fully covered" and "My credit card covers me" by noting that the customer may still want to purchase Dollar's coverage so that the customer's insurance or credit card company does not have to get involved in the event coverage is needed. Id.

B. The Named Plaintiffs

Plaintiff Sandra McKinnon rented a car at Dollar's Tulsa, Oklahoma airport location from March 29 to April 13, 2012. Mot. at 12. Ms. McKinnon's partner booked the reservation for the car on Ms. McKinnon's behalf through the Southwest Airlines website. TAC ¶ 13. Ms. McKinnon herself did not view any of the information

1 presented during the reservation process. ECF No. 107-12, Ex. B
2 ("McKinnon Dep.") at 41:6-11, 43:19-22. Ms. McKinnon alleges that,
3 once at Dollar's rental counter, an agent tried to up-sell her on a
4 variety of products, including LDW, but that she orally declined
5 those offers. TAC ¶ 14; McKinnon Dep. at 62:23-63:17. She then
6 signed an electronic signature pad and initialed the areas the
7 Dollar agent allegedly indicated to her were to be checked to
8 decline Add-On Products. TAC ¶ 14. Ms. McKinnon was then handed a
9 folded copy of a vehicle rental contract inside a rental contract
10 jacket. Id. The information regarding the additional fees for LDW
11 was printed on the contract, allegedly in tiny font with faded ink.
12 Id. Dollar charged Ms. McKinnon for LDW, but not for any other
13 Add-On Product. Mot. at 14-15. After returning her rental car,
14 Ms. McKinnon sent Dollar a letter demanding a return of the money
15 she paid for LDW, but Dollar rejected her request. Id.

16 Plaintiff Kristen Tool rented a car at Dollar's San Francisco
17 airport location from August 31 to September 9, 2012. Mot. at 15-
18 16. Ms. Tool's sister made the reservation for the rental on a
19 travel broker's website, and Ms. Tool herself did not participate
20 in making the reservation. ECF No. 107-12, Ex. C ("Tool Dep.") at
21 19:10-20. Ms. Tool alleges that, once at the Dollar counter, she
22 orally declined to purchase LDW and SLI and checked the required
23 boxes on the SigCap in order to decline those options. TAC ¶ 16.
24 Nevertheless, Dollar charged her \$231 for those products. Id. at
25 47:6-10, 91:17-24. After unsuccessfully appealing those charges
26 with Dollar, Ms. Tool disputed the charges with her credit card
27 company and received a refund. TAC ¶ 17. Ms. Tool also alleges
28 that she was not provided with oral disclosures at the rental

1 counter, did not receive an advance copy of the Dollar contract or
2 folder, and did not see a sign at the rental counter providing
3 disclosures as required by California Civil Code Section 1936. Id.
4 at 16.

5 Based on the facts described above, Plaintiffs' TAC asserts
6 eight causes of action against Defendants: (1-3) violations of
7 California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code
8 §§ 17200 et seq.), for unlawful, unfair, and fraudulent business
9 acts and practices; (4) violation of California's Consumers Legal
10 Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 et seq.); (5)
11 violation of the Oklahoma Consumer Protection Act ("OCPA") (Okla.
12 Stat. 15, § 751 et seq.); (6) breach of contract and breach of the
13 covenant of good faith and fair dealing; (7) declaratory relief;
14 and (8) unjust enrichment.

15 **C. Plaintiffs' Motion for Class Certification**

16 Plaintiffs seek to represent and have the Court certify two
17 classes (collectively "the Class"). The California Class is
18 defined as "all persons in the United States either residing in or
19 who rented cars in California from Dollar since January 1, 2009 and
20 were charged for Loss Damage Waiver ('LDW'), SLI and/or Road Safe
21 by Dollar other than as part of a pre-paid tour reservation." Mot.
22 at 1. The Oklahoma Class is defined as "all persons in the United
23 States either residing in or who rented cars in Oklahoma from
24 Dollar since January 1, 2009 and were charged for Loss Damage
25 Waiver ('LDW'), SLI and/or Road Safe by Dollar other than as part
26 of a pre-paid tour reservation." Id.

27 Plaintiffs' motion relies heavily on the claim that Dollar's
28 website fails to provide disclosures in violation of California

1 Civil Code Section 1936(h). Plaintiffs do not explain, however,
2 how this alleged violation creates a common factual or legal issue
3 as to class members who purchased Add-On Products other than LDW or
4 who purchased LDW outside of California. In addition, Plaintiffs
5 fail to address the Court's earlier order which held that Section
6 1936 does not apply to a car rental company's website. See ECF No.
7 68 ("MTD Order") at 10-12.

8 Plaintiffs also argue that Dollar violated Section 1936 by
9 failing to provide written disclosures on signage at the rental
10 counter and by failing to provide oral disclosures in violation of
11 California Civil Code Section 1936. Plaintiffs do not explain,
12 however, how these alleged violations create common factual or
13 legal issues as to class members who purchased Add-On Products
14 other than LDW or who purchased LDW outside of California. Even
15 within California, Plaintiffs do not provide evidence showing that
16 Dollar systematically failed to provide such disclosures throughout
17 its California locations.³

18 Finally, Plaintiffs claim that Dollar trains its employees to
19 use deceptive practices to induce customers into purchasing Add-On
20 Products. As evidence, Plaintiffs assert that they have reviewed
21 hundreds of complaints by consumers who claim that they were

22 ³ Plaintiffs provide declarations from customers who claim that
23 Dollar did not have signs at the specific locations where they
24 rented cars and that they were not provided with oral disclosures.
25 Dollar has presented evidence, however, showing that such signs are
26 present at its California locations (except under certain
27 circumstances, such as when an office is undergoing renovations)
28 and that its agents are trained to provide oral disclosures. The
evidence suggests that signs were not always present at every
California location. It also suggests that there were at least
some occasions when oral disclosures were not provided. However,
Plaintiffs do not provide evidence demonstrating that signs were
generally absent throughout Dollar's California locations or that
Dollar agents systemically failed to provide oral disclosures.

1 pressured and deceived into purchasing Add-On Products. Plaintiffs
2 also point to training materials used to teach Dollar agents how to
3 persuade customers to purchase Add-On Products and to the fact that
4 agents are paid a commission based on how many Add-On Products they
5 sell. Although Plaintiffs' evidence establishes specific examples
6 of deception by particular Dollar agents, it does not point to
7 specific company-wide practices, trainings, or policies; describe
8 how those specific practices, trainings, or policies are deceptive;
9 or provide evidence showing that the alleged practices, trainings,
10 and policies were applied uniformly to all members of the class.

11 12 **II. LEGAL STANDARD**

13 "The class action is an exception to the usual rule that
14 litigation is conducted by and on behalf of the individual named
15 parties only." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,
16 2550 (2011) (internal quotations and citations omitted). "In order
17 to justify a departure from that rule, a class representative must
18 be part of the class and possess the same interest and suffer the
19 same injury as the class members." Id. (internal citations
20 omitted). Under Rule 23(a), four prerequisites must be satisfied
21 for class certification:

22 (1) the class is so numerous that joinder of all members
23 is impracticable;

24 (2) there are questions of law or fact common to the
25 class;

26 (3) the claims or defenses of the representative parties
27 are typical of the claims or defenses of the class; and

28 (4) the representative parties will fairly and adequately
protect the interests of the class.

1 Fed. R. Civ. P. 23(a). In addition, "apart from the explicit
2 requirements of Rule 23(a), the party seeking class certification
3 must demonstrate that an identifiable and ascertainable class
4 exists." Wolph v. Acer Am. Corp., 272 F.R.D. 477, 482 (N.D. Cal.
5 2011).

6 A plaintiff also must satisfy one or more of the separate
7 prerequisites set forth in Rule 23(b):

8 A class action may be maintained if Rule 23(a) is
9 satisfied and if:

10 . . .

11 (2) the party opposing the class has acted or refused to
12 act on grounds that apply generally to the class, so that
13 final injunctive relief or corresponding declaratory
14 relief is appropriate respecting the class as a whole; or

15 (3) the court finds that the questions of law or fact
16 common to class members predominate over any questions
17 affecting only individual members, and that a class
18 action is superior to other available methods for fairly
19 and efficiently adjudicating the controversy.

20 Fed. R. Civ. P. 23.

21 If a case does not qualify for class certification because of
22 individualized issues relating to damages, a court can still allow
23 it to proceed as a class action by certifying particular liability
24 issues pursuant to Rule 23(c)(4). Fed. R. Civ. P. 23(c)(4) ("When
25 appropriate, an action may be brought or maintained as a class
26 action with respect to particular issues.").

27 On a motion for certification, the plaintiff holds the burden.
28 Thus, "Rule 23 does not set forth a mere pleading standard. A
party seeking class certification must affirmatively demonstrate
his compliance with the Rule -- that is, he must be prepared to
prove that there are in fact sufficiently numerous parties, common
questions of law or fact, etc." Dukes, 131 S. Ct. at 2551

(emphasis deleted); see also Massa v. American Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012) ("The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of Federal Rule of Civil Procedure 23."). A court's analysis of these factors "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 2552 (internal quotations and citations omitted). "Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation." Id.

III. DISCUSSION

Plaintiffs' motion for class certification is DENIED because the proposed class definition is overbroad; it fails to satisfy Rule 23(a) requirements of commonality, typicality, and adequacy of representation; and it fails to satisfy the requirements of Rules 23(b)(2), 23(b)(3), and 23(c)(4).

A. Adequacy of the Class Definition

"A class definition should be precise, objective, and presently ascertainable." O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998). "The class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member." Wolph, 272 F.R.D. at 482. Though there is a split among district courts in the Ninth Circuit on the issue, the Court has followed the guidance of the Third Circuit in requiring plaintiffs to "show, by a preponderance of the evidence, that the class is currently and

1 readily ascertainable based on objective criteria." Carrera v.
2 Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013). "Administrative
3 feasibility means that identifying class members is a manageable
4 process that does not require much, if any, individual factual
5 inquiry." Id. at 307-08.

6 Although Plaintiff's class as currently defined can be
7 identified through objective proof, it is overbroad. It
8 encompasses three different products; transactions that have no
9 connection to California or Oklahoma; and purchasers who benefited
10 from their purchase, were provided with adequate disclosures, were
11 never exposed to any of the alleged deceptive practices, and/or
12 received refunds.

13 Plaintiffs' definitions include every customer that purchased
14 any one of three different products from Dollar -- LDW, SLI, or
15 RoadSafe -- with no explanation as to why those products should be
16 treated together. While LDW is subject to certain statutory
17 requirements in California (see Cal. Civ. Code § 1936), SLI is
18 subject to an entirely different set of rules (See Cal. Ins. Code §
19 1758.86), and no such requirements apply to RoadSafe in California
20 or to any of the products in Oklahoma. While it is true that
21 "[d]ifferences as to the various products purchased . . . do not
22 negate a finding of typicality, provided the cause of action arises
23 from a common wrong" (In re Cathode Ray Tube (CRT) Antitrust
24 Litig., MDL No. 1917, 2013 WL 5429718, at *10 (N.D. Cal. June 20,
25 2013)), the common wrong in this case centers on alleged violations
26 of California Civil Code Section 1936. Section 1936, however, only
27 applies to LDW sold in California.

28 ///

1 What is more, Plaintiffs include in their class definition
2 customers who "reside in" California and Oklahoma but who purchased
3 Add-On Products in other states. In its order on Defendants'
4 motion to dismiss, the Court expressly held that the statutes that
5 are the focus of Plaintiffs' motion -- particularly Section 1936 of
6 the California Civil Code -- do not have extraterritorial
7 application. MTD at 8-15. Nevertheless, Plaintiffs have included
8 in their class definition transactions that have no connection
9 whatsoever to California or Oklahoma.⁴

10 Plaintiffs attempt to hold their proposed class together with
11 alleged "per se" violations of California Civil Code Section 1936.
12 See Mot. at 4, 6, 18-19, 30. Section 1936, however, only applies
13 to one of the Add-On Products -- LDW -- and only LDW that is sold
14 in California.

15 Even with regard to customers who purchased LDW in California,
16 Plaintiffs fail to provide evidence of a uniform violation
17 applicable to all California class members. Plaintiffs' motion
18 leans heavily on the fact that Dollar's website does not contain
19 Section 1936 disclosures. The Court has already held, however,
20 that the disclosure requirements of Section 1936 do not apply to
21 Dollar's website. See MTD Order at 8-12. As to other potential
22 Section 1936 violations, the evidence shows that many, if not the
23 vast majority, of California customers are provided with the
24 disclosures mandated by Section 1936. See Capsanes Decl. ¶¶ 21,
25 31, 34; Lainez Decl. ¶¶ 14, 20, 22-23; Raman Decl. ¶¶ 8, 11-13;

26
27 ⁴ For example, California law would not apply to a California
28 resident who, upon arriving at an airport in New York, approaches
Dollar for the first time to reserve a car and purchase Add-On
Products.

1 Hayes Decl. ¶¶ 7, 13-15; Perring Decl. ¶ 11; Hayes Dep. at 29:13-
2 32:5, 37:24-38:5, 46:12-47:6; Lainez Dep. at 61:23-65:19, 79:21-
3 80:11; Raman Dep. at 30:8-13, 31:7-11; ECF No. 126-1; ECF No. 126-
4 2; ECF-No. 126-3; ECF No. 126-4.

5 In addition to purported "per se" violations of Section 1936,
6 Plaintiffs allege that the Defendants engaged in a variety of
7 deceptive practices, including training employees on how to
8 persuade customers to purchase Add-On Products, paying employees
9 commissions based on how many Add-On Products they sell, and
10 failing to adequately respond to customer complaints regarding Add-
11 On Products. Plaintiffs, however, fail to specify which aspects of
12 these practices are deceptive. Separately, Plaintiffs' class
13 definition is flawed because it includes persons who were not
14 exposed to any of the alleged practices, or who received a benefit
15 as a result of their purchase. See Diacakis v. Comcast Corp., No.
16 C 11-3002 SBA, 2013 WL 1878921, *4 (N.D. Cal. 2011) (rejecting as
17 overbroad a definition that "includes anyone who purchased [the
18 product], irrespective of whether he or she was deceived"). It
19 also includes people who received a full refund for their purchase
20 of the Add-On Products. See Turcios v. Carma Labs., Inc., 296
21 F.R.D. 638, 645 (C.D. Cal. 2014) (finding class was overbroad
22 "because it would include consumers who already received refunds
23 and, therefore, have not suffered any damages").

24 Mazza v. American Honda Motor Co. is instructive. 666 F.3d
25 581 (9th Cir. 2012). In Mazza, the Ninth Circuit reversed a
26 district court's decision to certify a class of all consumers who
27 purchased or leased Acura RLs equipped with a Collision Mitigation
28 Braking System ("CMBS"). Plaintiffs alleged that certain

1 advertisements misrepresented the characteristics of the CMBS and
2 omitted material information on its limitations in violation of
3 California's Unfair Competition Law (UCL) and other statutes.
4 Plaintiffs further argued that class certification was appropriate
5 because reliance as to the class as a whole could be inferred in a
6 UCL class action. The Ninth Circuit, however, held that the class
7 definition was overbroad insofar as it was not "defined in such a
8 way as to include only members who were exposed to [the]
9 advertising" Id. at 596; see also Berger v. Home Depot
10 USA, Inc., 741 F.3d 1061 (9th Cir. 2014) (holding that a
11 presumption of reliance in a UCL class action does not apply where
12 there is no uniform exposure to the alleged deceptive practice); In
13 re Clorox Consumer Litig., 301 F.R.D. 436, 444 (N.D. Cal. 2014)
14 (denying certification where plaintiffs sought to certify an "all
15 purchasers" UCL class on the basis of an allegedly misleading
16 advertisement where the evidence showed that a substantial portion
17 of class members likely never saw the advertisement); Davis-Miller
18 v. Automobile Club of S. Cal., 201 Cal. App. 4th 106, 125 (2011)
19 ("An inference of classwide reliance [under the UCL] cannot be made
20 where there is no evidence that the allegedly false representations
21 were uniformly made to all members of the proposed class.").

22 Here, Plaintiffs have neither alleged facts nor presented
23 evidence establishing that all members of the class were exposed to
24 a deceptive practice. Plaintiffs argue that lack of exposure to a
25 deceptive practice should not defeat their motion because exposure
26 to an alleged deceptive practice is "not an element of their
27 claims." Reply at 4. In support, they cite Astiana v. Kashi Co.,
28 a class action involving alleged deceptive advertising by a cereal

1 manufacturer. 291 F.R.D. 493 (S.D. Cal. 2013). The Astiana court,
2 however, explicitly held that "all class members were exposed to
3 [the alleged deceptive] representations" Id. at 500; see
4 also In re Tobacco II Cases, 46 Cal. 4th 298, 324 (presuming
5 reliance where "[t]he class, as certified, consists of members of
6 the public who were exposed to defendants' allegedly deceptive
7 advertisements and misrepresentations").

8 Because Plaintiffs' proposed class definition is overbroad,
9 the Court finds that it is neither "precise" nor "ascertainable".
10 See O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal.
11 1998).

12 **B. Rule 23(a) Requirements**

13 Rule 23(a) requires numerosity, commonality, typicality, and
14 adequacy of representation. See Mazza, Inc., 666 F.3d at 588.

15 **1. Numerosity**

16 Federal Rule of Civil Procedure 23(a)(1) requires that the
17 proposed classes be "so numerous that joinder of all members is
18 impracticable." Generally, "classes of forty or more are
19 considered sufficiently numerous." Delarosa v. Boiron, Inc., 275
20 F.R.D. 582, 587 (C.D. Cal. 2011). Plaintiffs demonstrate using
21 documents produced by Dollar that at least 1.75 million customers
22 purchased one or more of the Add-On Products when renting a car
23 from Dollar in California or Oklahoma during the relevant period.
24 Defendants do not contest these claims. The Court finds that the
25 numerosity requirement of Rule 23 is met.

26 **2. Commonality**

27 Commonality requires that "there are questions of law or fact
28 common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court

1 noted that this requirement is easy to misread, "since '[a]ny
2 competently crafted class complaint literally raises common
3 questions.'" Dukes, 131 S. Ct. at 2551. The claims must depend
4 upon a "common contention" that is "of such a nature that it is
5 capable of classwide resolution -- which means that determination
6 of its truth or falsity will resolve an issue that is central to
7 the validity of each one of the claims in one stroke." Id. What
8 matters "is not the raising of common questions -- even in
9 droves -- but rather the capacity of a classwide proceeding to
10 generate common answers apt to drive the resolution of the
11 litigation." Id.

12 As a common claim applicable to all, Plaintiffs focus on
13 alleged "per se" violations of California Civil Code Section 1936.
14 Mot. at 4-6, 18-20, 30. Specifically, they argue that Dollar fails
15 to provide disclosures required by sub-sections (j) and (g) for
16 reservations made through Dollar's website. The Court already
17 rejected this approach in its order on Defendants' motion to
18 dismiss. See MTD Order at 10-12 ("[N]othing in Section 1936(g)
19 purports to cover online reservations . . . The Court finds
20 Plaintiff's proposed interpretation of Section 1936(g) unconvincing
21 . . . Section 1936(j) concerns advertisements in California . . .
22 The Confirmation is not an advertisement."). In any event, even if
23 the reservations made through Dollar's website constituted a per se
24 violation of Section 1936, it is undisputed that many of the
25 proposed class members did not use Dollar's website to make a
26 reservation.

27 At other points in their motion and reply, Plaintiffs claim
28 that Dollar engaged in per se violations of Section 1936 by failing

1 to provide required disclosures in advertisements and signage.
2 Mot. at 18. The evidence shows, however, that Dollar has in fact
3 posted signs providing Section 1936 disclosures at its California
4 locations. Lainez Decl. ¶ 22, Hayes Decl. ¶ 14, Raman Decl. ¶¶ 11-
5 12. Although Plaintiffs have provided evidence showing that Dollar
6 may have sometimes failed to provide adequate disclosures at
7 certain locations, determining whether Dollar failed to provide the
8 required signage is an individualized matter that would depend on
9 the specific location visited and the date of that visit. See
10 Berger, 741 F.3d at 1069 (holding that varying LDW signage "over
11 time and among the different locations" is a "crucial issue" that
12 the "district court reasonably held must be resolved on an
13 individual rather than a class-wide basis").

14 Plaintiffs also assert that Dollar representatives failed to
15 provide oral disclosures required by Section 1936. Plaintiffs do
16 not present any evidence, however, demonstrating that Dollar
17 representatives throughout California uniformly failed to provide
18 such disclosures.⁵ Thus, determining whether a Dollar
19 representative failed to provide oral disclosures would require a
20 level of individualized analysis incompatible with a class action.
21 See Berger, 741 F.3d at 1069 ("[O]ral notice given by employees
22 about the optional nature of the damage waiver during a particular
23 rental transaction would necessarily be a unique occurrence.").

24 Even if Plaintiffs had effectively argued for an alleged "per
25 se" violation of Section 1936 as a common claim applicable to all,

26 ⁵ In fact, the evidence suggests that Dollar's representatives
27 generally provide such oral disclosures. Lainez Dep. at 79:21-
28 80:11; Hayes Dep. at 46:12-47:6; ECF No. 126-6 ("Raman Dep.") at
30:8-13, 31:7-11; Capsanes Decl. ¶¶ 21, 31; Hayes Decl. ¶ 7; Lainez
Decl. ¶ 14; Raman Decl. ¶ 8.

1 this claim would only apply to persons who purchased LDW in
2 California. It would not apply to class members who rented cars
3 from Dollar in Oklahoma or class members who reside in California
4 but did not purchase LDW in California. Further, even with respect
5 to the California class members who made their purchase in
6 California, Section 1936 does not apply to customers who purchased
7 SLI or RoadSafe.

8 Since there is no "per se" violation applicable to all class
9 members, Plaintiffs' motion turns on whether Plaintiffs can
10 establish a scheme to defraud customers that is sufficiently
11 uniform and widespread that it poses common questions of law and
12 fact. Plaintiffs' theory is that Defendants' reservation system,
13 coupled with its alleged practice of tricking customers into paying
14 add-on fees once they rent their cars, amounts to a "bait and
15 switch" scheme that renders Defendants' quoted reservation prices
16 unfair or fraudulent. Plaintiffs' allegations are vague, but they
17 seem to include the following: omission of "material information to
18 customers" (Reply at 10-12),⁶ deceptive marketing efforts (Reply at
19 11),⁷ paying commissions that encourage deceptive behavior by

20 ⁶ Plaintiffs point out that Dollar does not offer "advice, input or
21 instruction on the coverage [that] consumers likely already have."
22 Reply at 12. There is nothing deceptive about Dollar not providing
23 advice about third party products. Moreover, Dollar
24 representatives explain that "every coverage is different" and a
25 customer should "talk to [his/her] credit card or insurance"
26 carrier. Raman Dep. at 32:15-23, 37:20-38:2, 39:14-23.

27 ⁷ Plaintiffs list practices that they characterize as deceptive,
28 such as training agents how to persuasively sell Add-On Products,
only offering Add-On products at the rental desk, and training
agents not to ask a consumer if they have coverage through another
source. Reply at 11. As a general matter, there is nothing
obviously or inherently deceptive about these practices. Before
class certification can be granted, Plaintiffs must identify the
deceptive aspects of these practices with some amount of
specificity and then articulate the common issues of fact and law,
if any, that apply to the proposed class as a whole.

1 Dollar agents (Mot. at 7), using a dark electronic pad that
2 prevents customers from being able to review the terms of their
3 rental agreement (Mot. at 7), and implementing a customer complaint
4 system designed to deflect complaints about Add-On Products (Mot.
5 at 8).

6 The Ninth Circuit's decision in Berger v. Home Depot USA, Inc.
7 is instructive. 741 F.3d 1061 (9th Cir. 2014). There, the
8 plaintiff alleged that Home Depot automatically imposed a ten
9 percent surcharge for a damage waiver on tool rentals in its
10 California stores, and although that fee was to be optional, Home
11 Depot's failure to inform customers of their ability to decline the
12 surcharge allegedly violated California's Unfair Competition Law
13 ("UCL"), the California Consumer Legal Remedies Act, and common-law
14 theories of unjust enrichment. Id. In affirming the district
15 court's denial of class certification, the Ninth Circuit held that
16 "variance over time and among the different Home Depot locations,
17 and any oral notice given by Home Depot employees about the
18 optional nature of the damage waiver during a particular
19 transaction would necessarily be a unique occurrence." Id. at
20 1069; see also Szabo v. Bridgeport Machines, Inc., 249 F.3d 672,
21 673-74 (7th Cir. 2001) (rejecting class certification where "[i]t
22 is unlikely that dealers in different parts of the country said the
23 same things to hundreds of different buyers"); In re Life USA
24 Holding Inc., 242 F.3d 136, 146 (3d Cir. 2001) (rejecting class
25 action based on representatives made to 280,000 purchasers by
26 30,000 sales agents); Herskowitz v. Apple, Inc., 301 F.R.D. 460,
27 481 (N.D. Cal. 2014) (rejecting class certification in case
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1 involving "Apple's variable conduct in the course of diverse,
2 individualized transactions").

3 As in Berger, whether Dollar violated the UCL by engaging in
4 unfair or deceptive practices depends on what particular agents
5 said to particular customers. Although Plaintiffs claim that
6 Dollar engaged in "uniform" deceptive practices in violation of the
7 UCL, they do not describe with any precision the deceptive aspects
8 of the alleged practices or the extent to which all members of the
9 proposed class were exposed to those practices. As a result, there
10 is no commonality. See Herskowitz, 301 F.R.D. at 476 (holding that
11 a business practice that allegedly violates the UCL must be
12 "amenable to some degree of precise definition" or the commonality
13 analysis will "devolve into an individualized inquiry into
14 [Defendants'] behavior in the course of specific transactions").

15 Commonality also fails as to Plaintiffs' CLRA claim because
16 the CLRA requires that "each potential class member have both an
17 actual injury and show that the injury was caused by the challenged
18 practice." Mazza, 741 F.3d at 1069. Plaintiffs' class definition,
19 however, includes individuals who were not injured because they
20 were not deceived or because they benefited from the additional
21 coverage. Further, although an inference of reliance can sometimes
22 be made, a plaintiff must "point to some type of common proof" of
23 materiality. Badella v. Deniro Marketing LLC, 2011 WL 5358400, at
24 *7-9 (N.D. Cal. 2011). Plaintiffs have not pointed to common
25 proof. Instead, they allege facts that apply only to some
26 customers, at some locations, some of the time.

27 Likewise, there is no commonality as to Plaintiffs' OCPA claim
28 because Plaintiffs do not provide any evidence of uniform unlawful

1 conduct across all of the transactions that took place in Oklahoma.
2 Nor do they provide evidence of class-wide "loss or injury
3 resulting from a violation of the [OCPA]." Walls v. American
4 Tobacco Co., 11 P.3d 626, 630 (Okla. 2000).

5 Finally, the individualized inquiries at issue in the case
6 defeat commonality as to the Plaintiffs' breach of contract and
7 unjust enrichment claims. While Plaintiffs allege that an on-line
8 reservation is a contract that is breached by additional products
9 sold at the rental counter, the parties are free to change a prior
10 agreement. Whether a class member agreed to make a change to the
11 agreement is an individualized question.⁸ Similarly, whether a
12 sale of Add-On Products is unjust is an individualized question
13 that focuses on the individualized circumstances of the sales based
14 on the oral transactions between the class members and the Dollar
15 agents. See Berger, 741 F.3d at 1070 ("Whether receipt of funds
16 for the damage waiver was unjust or inequitable . . . necessarily
17 rests on individualized determinations . . . [including the] oral
18 representations from employees.").

19 The cases cited by Plaintiffs are distinguishable. In the
20 Schwartz case, the court found that commonality could be shown
21 because the plaintiff "will be able to prove this element using
22 common evidence given the fact that Avis entered into a standard
23 form contract . . . over the class period and that the surcharge
24 information was presented in a similar manner to most Avis
25 customers for that period." Schwartz v. Avis Rent A Car System,
26 LLC, No. 11-4052 (JLL), No. C 10-03908 CRB, 2014 WL 4272018, at *9

27 ⁸ Further, many members of the proposed class did not reserve a
28 rental ahead of time, and most did not use Dollar's website. As a
result, there was no preexisting contract for those customers.

(D.N.J. Aug. 28, 2014). In Sobel, the court found common questions where the class members' claims arose "out of Hertz's standard practice of quoting and charging unbundled [surcharge for airport concession fees] at Nevada airports." Sobel v. Hertz Corp., 291 F.R.D. 525, 541 (D. Nev. 2013). In contrast, the information regarding the Add-On Products in this case was not presented through a contract applicable to all class members or in a standardized way such as through a script.⁹ The evidence shows that what the class members were told or understood regarding the products, and their reasons for purchasing the products, could have varied greatly depending on their individualized communications with Dollar agents.

For these reasons, the Court finds that the commonality requirements of Rule 23(a) have not been met.

3. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The Ninth Circuit has interpreted the typicality requirement permissively. For example, although class representatives' claims must be "reasonably co-extensive with those of absent class members[,]" they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's

⁹ Plaintiffs make reference to scripts throughout their motion and reply and cite to training materials that instruct Dollar agents on how to persuade customers to purchase Add-On Products. Plaintiffs fail to identify, however, the deceptive aspects of these "scripts," nor do they establish that all class members were exposed to them.

1 legal theory, not the injury caused to the plaintiff. Typicality
2 does not require that all class members suffer the same injury as
3 the named class representative." Simpson v. Fireman's Fund Ins.
4 Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005). Typicality is not
5 satisfied, however, when "[a] named plaintiff who proved his own
6 claim would not necessarily have proved anybody else's claim."
7 Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998).
8 Moreover, "[c]ourts of appeal have held that unique defenses bear
9 on . . . typicality." In Re Hurethane Antitrust Litig., 251 F.R.D.
10 629, 642 (D. Kan. 2008) (citing Beck v. Maximus, Inc., 457 F.3d
11 291, 296 (3rd Cir. 2006)); see also Hanon v. Dataproducts Corp.,
12 976 F.2d 497, 508 (9th Cir. 1992) (holding that the typicality
13 requirement precludes certification "if there is a danger that
14 absent class members will suffer if their representative is
15 preoccupied with defenses unique to it").

16 The requirement of typicality has not been met for many of the
17 same reasons that the requirement of commonality was not met.
18 Because there are not sufficient legal and factual issues common to
19 the class, Plaintiffs' cases are not typical of class members.
20 This makes sense given that "[t]he commonality and typicality
21 requirements tend to merge." Gen. Telephone Co. v. Falcon, 457
22 U.S. 147, 157 n.13 (1982). "Both serve as guideposts for
23 determining whether [in] the particular circumstances maintenance
24 of a class action is economical and whether the named plaintiff's
25 claim and the class claims are so interrelated that the interests
26 of the class members will be fairly and adequately protected in
27 their absence." Id.

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1 The named Plaintiffs are also not typical of the other class
2 members as a whole because they are subject to unique factual
3 circumstances and defenses such that proof of their own claims
4 would not necessarily prove the other class members' claims.
5 Plaintiffs' motion argues that class members were deceived into
6 purchasing the Add-On Products as a result of deceptive sales
7 techniques and omitted disclosures. However, neither named
8 Plaintiff alleges that she was misled into purchasing the Add-On
9 Products. Rather, Ms. Tool and Ms. McKinnon both claim they knew
10 they did not wish to purchase the Add-On Products, expressly
11 declined to purchase the Add-On Products at the counter, but were
12 charged for Add-On Products nevertheless. That is a fundamentally
13 different set of facts from Plaintiffs' averments on behalf of the
14 class as a whole, which center on alleged practices (primarily a
15 failure to provide disclosures) that induced class members to
16 purchase Add-On Products that they would not have otherwise
17 purchased.

18 Plaintiffs argue that their claims "are typical of the claims
19 of the Class because all Dollar customers in California and
20 Oklahoma that purchased Add-On Products were subjected to Dollar's
21 uniform advertising and sales practices."¹⁰ Mot. at 20.

22 California and Oklahoma customers, however, were not exposed to
23 uniform advertising and sales practices. For example, most class
24 members did not use Dollar's website. Further, most Dollar

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27 ¹⁰ Plaintiffs cannot satisfy the requirements of Rule 23 by stating
28 in conclusory fashion that Dollar engaged in "uniform advertising
and sales practices." They must be specific, and they must provide
evidence to support their claims.

1 locations in California provided disclosures orally and on rental
2 contracts, contract sleeves, signs placemats, and other materials.

3 There are various other typicality problems. Plaintiff Tool
4 received a refund for her purchase. In a case against Dollar
5 involving an identical set of facts, the District of Colorado found
6 in that a plaintiff who received a refund does not satisfy the
7 typicality requirement because the refund "negat[es] any claimed
8 injury." Friedman v. Dollar Thrifty Auto. Grp., Inc., 304 F.R.D.
9 601, 612 (D. Colo. Jan. 27, 2015). Further, neither Ms. McKinnon
10 nor Ms. Tool purchased all three products at issue. See Wiener v.
11 Dannon Co., Inc., 255 F.R.D. 658, 666 (C.D. Cal. 2009) (holding
12 that "named plaintiff that purchased a different product than that
13 purchased by unnamed plaintiffs fails to satisfy the typicality
14 requirement"). This is particularly important given that
15 Defendants' liability as to each product differs as a result of the
16 different regulations and legal theories that apply to each
17 (especially with regard to the disclosure requirements of
18 California Civil Code Section 1936, which only apply to LDW sold
19 in California).

20 For these reasons, the Court finds that the typicality
21 requirement of Rule 23(a) has not been met.

22 4. Adequacy of Representation

23 This requirement ensures that plaintiff "will fairly and
24 adequately protect the interests of the class." Fed. R. Civ. P.
25 23(a)(4). The Ninth Circuit applies a two-part test to determine
26 the adequacy of class representation. First, the representative
27 plaintiffs and their counsel must not have conflicts of interest
28 with other class members. Second, the representative plaintiffs

1 and their counsel must prosecute the action vigorously on behalf of
2 the class. Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir.
3 2003).

4 This factor is satisfied as to Plaintiffs' law firm, Whatley
5 Kallas, LLP, an experienced consumer class action firm. Further,
6 Plaintiffs' counsel possess the skill, time, and resources needed
7 to pursue this case to resolution, and they have vigorously
8 prosecuted this action on the Class's behalf.

9 Plaintiffs are not adequate representatives, however. As
10 already discussed, Plaintiffs have conflicts with other class
11 members due to their unique factual circumstances and the unique
12 defenses Defendants will likely assert against them that are not
13 applicable to the class as a whole.

14 For these reasons, the Court finds that the adequacy of
15 representation requirement of Rule 23(a) has not been met.

16 **C. Rule 23(b) Requirements**

17 In addition to satisfying the requirements of Rule 23(a), a
18 class action must fit at least one of the categories defined in
19 Rule 23(b). Plaintiffs assert that this class action qualifies
20 under Rule 23(b)(2) and Rule 23(b)(3).

21 **1. Rule 23(b)(2)**

22 Rule 23(b)(2) states that "a class action may be maintained if
23 Rule 23(a) is satisfied and if . . . the party opposing the class
24 has acted or refused to act on grounds that apply generally to the
25 class, so that final injunctive relief or corresponding declaratory
26 relief is appropriate respecting the class as a whole." Rule
27 23(b)(2) does not authorize class certification therefore in the
28 context of "diverse, individualized transactions" that vary

1 "depending on the specific facts giving rise to the individual
2 customer's claim." Herskowitz, 301, F.R.D. at 481. Further, Rule
3 23(b)(2) "does not authorize class certification when each class
4 member would be entitled to an individualized award of money
5 damages." Dukes, 131 S. Ct. at 2557. Nor is certification under
6 Rule 23(b)(2) permitted where plaintiffs seek monetary relief for
7 the class and such relief is not merely incidental to the
8 injunctive or declaratory relief. Kanter v. Warner-Lambert Co.,
9 265 F.3d 853, 860 (9th Cir. 2001); see also Robertson v. North
10 American Van Lines, No. C-03-2397, 2004 WL 5026265, *4 (N.D. Cal.
11 2004) (holding that injunctive relief must be the "primary relief
12 sought").

13 As already discussed, liability in this case turns on
14 individualized interactions between Dollar agents and customers
15 involving unique facts and defenses that make it unsuitable for
16 certification under Rule 23(b)(2). Algarin v. Maybelline, LLC, 300
17 F.R.D. 444, 459 (N.D. Cal. 2014) (denying Rule 23(b)(2)
18 certification because the facts would require an "assessment of
19 each class member's claim . . . [such as] which products she
20 purchased"). Certification under Rule 23(b)(2) is also
21 inappropriate because Plaintiffs primarily seek individualized
22 monetary damages, including "actual, compensatory, statutory,
23 and/or exemplary damages" and "restitution of all monies paid for
24 unwanted products." TAC ¶¶ 27, 38. Finally, certification under
25 Rule 23(b)(2) is inappropriate because "Plaintiffs have not
26 adequately defined what injunctive/declaratory relief is applicable
27 to the entire class, i.e., Plaintiffs have not specified the class-

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1 wide injunction that would be appropriate to all class members."
2 Friedman, 304 F.R.D. at 614.

3 **2. Rule 23(b)(3)**

4 Rule 23(b)(3) requires the Court to find that "questions of
5 law or fact common to class members predominate over any questions
6 affecting only individual members, and that a class action is
7 superior to other available methods" Fed. R. Civ. P.
8 23(b)(3). The burden of demonstrating that common questions
9 predominate lies with the party seeking class certification.
10 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1188 (9th
11 Cir. 2001).

12 As already discussed, the Plaintiffs have not met the
13 commonality requirements of Rule 23(a). Because "[t]he commonality
14 preconditions of Rule 23(a)(2) are less rigorous than the companion
15 requirements of Rule 23(b)(3)," the Court need not provide
16 additional analysis on predominance. Hanlon, 150 F.3d at 1019.
17 Thus, the Court finds that questions of law or fact common to class
18 members do not predominate over questions affecting only individual
19 members. See generally, Berger, 741 F.3d 1061 (affirming the
20 district court's denial of class certification because common
21 questions did not predominate over individual issues where
22 liability turned on the oral representations made during each
23 transaction); Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020
24 (9th Cir. 2011) ("We do not, of course, suggest that predominance
25 would be shown in every California UCL case. For example, it might
26 well be that there was no cohesion among the members because they
27 were exposed to quite disparate information from various
28 representatives of the defendant."); Friedman, 304 F.R.D. at 616

(rejecting plaintiffs' argument "that the case involves standard sales practices that are uniform to all class members").

D. Rule 23(c)(4) Requirements

Rule 23(c)(4) states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." The rule "authorizes certification even if common issues do not predominate over the individual questions because the common issues can be separated by the court and certified for independent treatment." Emig v. Am. Tobacco Co., Inc., 184 F.R.D. 379, 395 (D. Kan. 1998). For example, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. See Slaven v. BP Am., Inc., 190 F.R.D. 649, 658 (C.D. Cal. 2000).

As discussed above, individualized damage and liability issues pervade this matter. Because no efficiency will be achieved in light of those issues, Plaintiffs' motion to certify under Rule 23(c)(4) is DENIED.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for class certification is DENIED WITHOUT PREJUDICE. Plaintiffs may, if they choose, file a new motion for class certification with a revised class definition within thirty (30) days of this order. As set forth above, Plaintiffs' revised definition must identify common issues of fact and law -- for example, by identifying specific deceptive practices applicable to all members of the proposed class. The revised definition cannot be overbroad, and the claims of the named Plaintiffs must be typical of the class as a whole.

1 Plaintiffs revised definition must also satisfy the requirements of
2 Rule 23(b).

3 Defendants' motion to exclude the expert testimony of Donald
4 Lichtenstein is also DENIED as moot.

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6 IT IS SO ORDERED.

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8 Dated: July 27, 2015



9 UNITED STATES DISTRICT JUDGE
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